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08-346 JUL 30 2008

No.

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IN THE

Supreme Court of the United States

DONALD ROTH, JR.,

Petitioner,

- against -

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a criminal defense attorney acting on behalf of a client have a Fifth and Sixth Amendment right to have a jury charged under Title 18 U.S.C. § 1515(c) that there is a safe harbor provision applicable to an obstruction of justice and witness tampering conspiracy under 18 U.S.C. § 371, such that the failure to request such a charge or give such a charge constitute plain error?.

2. Does the trial court's failure to permit expert testimony in the area of what a criminal defense lawyer is ethically required to do in defense of a client constitute a deprivation of such safe harbor evidence?

LIST OF PARTIES

Petitioner Donald Roth, Jr. and the United States of America are the parties in the instant case.

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DEFENSE OF A CLIENT FAILED TO PROPERLY INSTRUCT THE JURY, NOR WAS THE LAW PROPERLY OR FAIRLY ENCOMPASSED IN THE GENERAL INSTRUCTION THAT A CONSPIRACY REQUIRES A DETERMINATION THAT THE DEFENDANT WAS PART OF AN ILLEGAL AGREEMENT WHEN THE STATUTE PROVIDES A COMPLETE DEFENSE OR AN AFFIRMATIVE DEFENSE TO THE SOLE COUNT OF CONVICTION, SUCH THAT THE FAILURE TO REQUEST SUCH A CHARGE OR GIVE SUCH A CHARGE CONSTITUTE PLAIN ERROR

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Donald Roth, Jr., respectfully prays that a Writ of Certiorari issue to review the judgment below.

OPINION BELOW

The unpublished opinion of the United States Court of Appeals for the Second Circuit (Winter, Straub, Sotomayor, CJJ), dated February 22, 2008, United States v. St. John, et al., No 05-2430, affirming the petitioner's conviction is appended hereto as A-1.

JURISDICTION

Petitioner seeks a Writ of Certiorari to review the judgment of the Second Circuit Court of Appeals entered on February 22, 2008. No petition for rehearing was filed. This Court's jurisdiction is invoked pursuant to 18 U.S.C. Section 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fifth Amendment. The text appears at A-7.

United States Constitution, Sixth Amendment. The text appears at A-7

Title 18 U.S.C. 1515(c). The text appears at A-8.

STATEMENT OF THE CASE

Petitioner, Donald Roth seeks a Writ of Certiorari under the authority of Supreme Court Rule 10 (1) (c) in that the United States Court of Appeals for the Second Circuit has decided an important question of federal law that has not been, but should be, settled by this Court. The Writ should issue on the basis of a failure of the application of Title 18 U.S.C. § 1515 (c) and thus allowing a jury to apply the law, setting limits on what constitutes obstruction of justice under 18 U.S.C. § 371 in relation to the constitutional, ethical and legal duties of a defense counsel. The Court's instructions and its exclusion of expert testimony did not meet the requirement of a fair trial interfered with the Sixth Amendment right to present a defense, and Fifth Amendment rights, to meet the government's evidence.

To obtain a conviction, the prosecution used legitimate criminal defense goals and techniques to create a guilty state of mind out of the ethical obligations of a criminal defense lawyer to a client. The court denied the defense the opportunity to call a prominent defense lawyer as an expert witness on these issues on the basis that the Court would instruct the jury on these matters, and then reneged on the promise merely telling the jury that there was nothing wrong with seeking to talk to a witness.

The entirety of the instruction was as follows:

> "I further instruct you that there is nothing improper about a defense attorney or private investigator interviewing witnesses for the prosecution in a matter where they have been retained"

The Second Circuit found total sufficiency in calling the jury's attention that the conspiracy must be for an illegal purpose and thus the mere statement is enough to embrace bona fide legal services of a criminal defense attorney. The charge at trial and the Second Circuit's opinion prevents the jury from being properly instructed so as to fairly evaluate the charges in the case, given the obligations of a criminal defense lawyer being fundamentally different than common experience. The court in failing to honor its promise to instruct the jury on the ethical and legal duties of a criminal defense lawyer to a client allowed the lawyer to be made out in the cross-examination to be duplicitous and false, regarding the defense lawyer's knowledge and his obligation to the client. The current state of the law as a consequence of the decision below is that in investigating and defending a client, a criminal defense attorney if told by his client that he is guilty, must not approach the government's informant in the case to test the informant's willingness to swear to anything. Such a state of law insulates only the government informant from any test of veracity at the cost of criminal conviction to the lawyer who seeks to tempt the witness to show in advance of

trial the informant's true colors. In effect the Sixth Amendment is altered by now requiring at personal peril that the defense investigation must of necessity act by accepting the defendant's guilt when investigating the veracity or lack thereof of an informant for the government.

STATEMENT OF FACTS

Donald Roth, Petitioner, then a criminal defense attorney doing a mix of private and court appointed cases, was tried on a single count of conspiracy to obstruct justice, 18 U.S.C. § 371, with two objectives: to tamper with witnesses and to obstruct justice. The actions that led to Roth's conviction occurred solely in defense of two of Roth's clients, Cherry and Bryant. Roth was convicted and sentenced to the maximum five year term, which he will begin serving at the end of July 2008.

In separate cases, Cherry and Bryant were charged federally with gun and drug crimes based solely upon cooperation by one Charles "Flip" Melvin. Roth was their retained lawyer. He in turn hired an investigator St. John to locate and interview Melvin about Cherry and Bryant. Retained by the Bryant family based upon prior success in getting a manslaughter plea in a murder case with three alleged eyewitnesses, on which some of the witnesses provided sworn statements to the police provided contrary sworn statements to the investigator, Roth represented Ray Bryant in federal court. The second client Cherry had been previously represented by Roth who got a drug possession case reduced to

loitering. Based on the belief that the same informant "made" both cases, Roth hired an investigator to find and interview Melvin. The meeting was privately arranged.

In actuality, ATF agents sent a wired Melvin to the meeting. Melvin's recording failed. The defense investigator distrusting of Melvin wired himself up and recorded the whole interaction. It was the investigator's recording that was played at trial. St. John carried with him blank affidavits, recanting the statements for Melvin to sign. St. John on tape is heard telling Melvin that if it is not true then he cannot sign the paper. Melvin claimed that St. John made a contrary motion.

Under a Federal Rule of Evidence 404(b) theory, under allegations of getting false affidavits in Bryant's brother's case, Roth also faced essentially equivocal testimony that in an earlier case for Bryant's brother he had directed the investigator he obtained affidavits that led to a reduced plea from murder to manslaughter. The consequence was that the main case came to be overwhelmed by a mass of evidence that was far more ambiguous in terms of its proof than the government alleged in the indictment, set up a trial within a trial as to the murder case itself, including an *auto de fe* as to Roth's belief in the former client's innocence but still allowed a plea of guilty thus pleading an "innocent man" guilty, which was what the prosecution presented to the jury as either duplicity to the client or a lie to the jury.1

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1 The defense moved twice to strike the 404(b) evidence as regard Tone once mid-trial and at the end of the case

Donald Roth testified in his own defense. In direct that consumed more than 400 pages and a cross that consumed 600 pages, little was touched upon that related to the main case in chief. Roth attempted to defend himself and his work on that earlier state case, as well as in other matters working as a criminal defense lawyer. As to the first federally charged defendant Bryant, he had represented the brother in an earlier state case. In the earlier murder case, Roth worked with the

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because the government failed to prove a key proposition in the logical structure of admissibility. Because the state court judge had the final say on acceptance of the plea and imposition of sentence, and because the admission of evidence was predicated on the major premise that but for the false statements, the defendant would not have been permitted to plead to manslaughter, the failure to prove that the judge was not affected by the affidavits. The government failed to prove that the judge's decision to accept the plea was influenced or caused by the alleged false affidavits and thus there was a failure of proof. The court ruled that it would not strike the evidence. It found that Roth's testimony, not the government's evidence as to the two points in the process where the person is permitted to plead, once by the prosecutor and then by the judge supported the Fed.R.Evid. 404(b) evidence. Thus, the Fed.R.Evid. 404(b) rested according to the Court, on the Roth testimony in the defense case not on the testimony in the case in chief. The court ignored the fact that mid-trial, the defense moved to dismiss the case because Roth could not defend himself from the Fed.R.Evid. 404(b) allegation, because attorney/client privilege was being used as a sword and a shield. The Court rejected the motion because it was not written down and not appropriately placed suggesting that it was not worth the court's time. When the defense attempted to focus the Court on the issue that if there is a privilege, it is overcome by the crime fraud exception, the court ruled that it was not a matter for the court to rule on. The Court asked if all the peacocks stretched their feathers.

investigator St. John for the first time. Roth instructed him to interview witnesses for both sides. St. John, based on his law enforcement experience, gave Roth his opinion of the veracity of the witnesses and the police.

Roth also believed in the earlier case that the defendant that Tone was not guilty. He denied even being present and denied the shooting to Roth up until the moment that he took the plea to manslaughter. Even during the plea colloquy Tone said he was not guilty. The judge had Roth talk to the client. That client even asserted his innocence to the Probation Department before sentencing. Roth believed that he took the plea to avoid getting 32 years after trial. Roth believed that the brother was not guilty from the interviews St. John did, conversations with the client, a 911 tape, identifications of the shooter at least one of which was racially inconsistent with the client, and other interviews with people not referred to by the prosecutors. Although, trying to get the truth out of the client and his family was "a moving target" Roth felt that his denial of guilt was still believable.

As to Roth's contact with Cherry, Roth testified as his role in Cherry's prior state crack cocaine case which was reduced to a loitering charge. While the case was still pending, Roth met Cherry in a steakhouse. Cherry testified that at the meeting Roth bragged about using false affidavits to get rid of cases. Roth testified and denied it.

After both Cherry and Bryant were charged Roth believed that Melvin was the informant and retained by both defendants, he hired St. John to

find and interview Melvin. St. John was arrested after the interview. Thereafter, Roth met separately in jail with Cherry and Bryant. Roth in front of a witness he had brought, told Cherry and Bryant each of St. John's arrest, the search of his law office and that the federal agents had their files and that Roth, was the subject of a federal investigation. He contemplated withdrawing from their cases or he would be forced out. Cherry said he knew nothing and asked for money back. Roth demurred. Bryant insisted he was innocent, knew nothing of drug distribution and wanted bail. Despite Ray's testimony, Roth's witness testified that Roth made no hand gestures to Ray Bryant.

When challenged on his statements at the Cherry and Bryant bail hearings reciting that there was an informant in the case with a long criminal record, Roth admitted that he meant Flip because the clients kept naming him. Ray claimed Flip was present but asserted that there were no deals as to guns or drugs.

Roth in defending Bryant and Cherry, Roth wanted a face to face meeting with the informant to insure it was really Melvin they were speaking to, to have St. John assess truthfulness and to get in advance all the information that the government might or might not give him for trial in advance such as demographic information, names, aliases, family data, charged crimes, drug and alcohol abuse history, pending cases, old cases, dealings with Cherry or Bryant, knowledge of the allegations in the complaints, any other illegality that might be concealed from the prosecutors. If Flip admitted being the informant, St. John was to get details

about the things he did and whether he had buy money, a body wire, buy or a tape recorder, who put it on, who searched him before and after, and whether he was strip searched and did they let him make calls from other locations and different matters as to the investigative techniques used including action by law enforcement that would be fodder for a suppression motion.

Roth was also looking for impeachment material on or even better from Melvin, in terms of contradictory statements, in case there was a trial. If Flip signed a false affidavit, then it would have had value to the defense as impeachment. Flip's recorded volunteering to sign an affidavit that Flip claimed was false was also impeachment. A further bribe or extortion attempt by Flip also would have been helpful in destroying his credibility.

Roth stated that the reason to get the information as to Flip was based on his ethical obligations to each client to investigate and check every possible avenue. The purpose of affidavits was to have something on paper to impeach a witness with when they testified adversely to what they said.

The prosecution underlying theory was that once the lawyer had a claim of innocence, he could not let the client do anything but go to trial. It made out that the lawyer knew the truth from a client. It also put before the jury totally improperly that the lawyer not the client had control over the defendant's actions in a case as to pleading or going to trial.

First, the government cross-examination set up the proposition that Roth, a criminal defense lawyer, must know what the truth is from a client as to guilt or innocence. Repeatedly, Roth was asked who killed the manslaughter victim. Roth said he did not know. He did not know if the Bryant brother told the truth at the plea of guilty. Roth was attacked for letting an "innocent" client plead guilty as if the defense lawyer had some control over whether or not the defendant pleads guilty. Roth was forced to admit that when the client told the lawyer he did not do, the client could still be permitted to plead guilty and the lawyer did not stop it. Roth was also attacked for not invoking an Alford process for a defendant, even though every prosecutor knows that there must be consent from the prosecution for an Alford plea. Roth was attacked for letting his client plead to the charges when the federal government could also charge the client. Roth stated the proper legal obligation and standard. "I advised him according to his wishes to plead guilty".

Roth was also challenged on why he did not passively wait for the federal government to turn over discovery. Roth stated that sometimes the government did not get everything from the police. The government also suggested that there was something improper about Roth referring another Bryant brother, who had a court appointed lawyer to a private lawyer.

In closing, the government argued what a defense lawyer does in terms of pleas when you do not believe that your client is guilty and claimed that one should not be ecstatic if your client got

only five years. Despite paying lip service to the work of the defense bar, the government told the jury that they have to stay within the rules, and the rule is that you cannot use evidence that you know is untrue.

At the charge conference, the only defense discussed was the affirmative defense in the statute to witness tampering 18 U.S.C. § 1512 (b) (1) and (2). It appeared that the parties and the Court were unaware of Title 18 U.S.C. § 1515 (c) which provided a defense to both the witness tampering and the obstruction portions of the conspiracy charge.

While counsel did not want a defense instructed as to only one object of the conspiracy because it would highlight the absence of a defense to the other charged portion of the conspiracy, no one knew that a single section provided the defense to both. The government successfully opposed any other charge that could have embraced the language of 18 U.S.C. § 1515 (c).

Not a soul spoke of 18 U.S.C. § 1515 (c) which would have embraced both objects of the conspiracy and provided a defense.

The Second Circuit concluded that the court instructed that the jury had to find that the defendants "knowingly conspired to pursue an unlawful purpose which by definition excludes the possibility of bona fide legal advice constituting criminal behavior and thus there was no error (Unpublished opinion, A-4).

REASONS FOR GRANTING THE WRIT

POINT I

A CONFLICT IN THE CIRCUITS EXIST WITH REGARD TO THE ISSUES OF JURY INSTRUCTIONS WHEN A CRIMINAL DEFENSE LAWYER IS CHARGED WITH CONSPIRING TO OBSTRUCT JUSTICE OR TAMPER WITH WITNESSES. THE FAILURE TO SPECIFICALLY INSTRUCT THE JURY REGARDING THE PROVISION OF TITLE 18 U.S.C. § 1515(C) REGARDING THE ACTS OF AS CRIMINAL DEFENSE LAWYER IN DEFENSE OF A CLIENT FAILED TO PROPERLY INSTRUCT THE JURY, NOR WAS THE LAW PROPERLY OR FAIRLY ENCOMPASSED IN THE GENERAL INSTRUCTION THAT A CONSPIRACY REQUIRES A DETERMINATION THAT THE DEFENDANT WAS PART OF AN ILLEGAL AGREEMENT WHEN THE STATUTE PROVIDES A COMPLETE DEFENSE OR AN AFFIRMATIVE DEFENSE TO THE SOLE COUNT OF CONVICTION, SUCH THAT THE FAILURE TO REQUEST SUCH A CHARGE OR GIVE SUCH A CHARGE CONSTITUTE PLAIN ERROR.

Lawyers should enjoy no special immunity. At the same time they should receive the benefit of those Congressional enactments that seek to protect them from lay jurors in criminal cases unfamiliar with the counter intuitive ethical command that a lawyer defend someone who they know is guilty will mistake good faith traditional lawyering for criminal conduct and convict a lawyer for obstruction of justice and witness tampering conspiracy when his acts were and did uphold the commandment of the Sixth Amendment

to the Constitution. The combination of the dishonest cross examination as to defense lawyering and the trial judge broken promise as to charging the jury is why the failure to provide a safe harbor defense permitted the conviction as a matter of law. Given the role of the defense lawyer in the Sixth Amendment, the failure to charge safe harbor of 18 U.S.C. § 1515 (c) is plain error. This case requires this Court to address the meaning, use, application and scope of Title 18 U.S.C. § 1515 (c).

> Title 18 U.S.C. § 1515 (c) provides: This chapter does not prohibit or punish the providing of lawful, bona fide, legal representation services in connection with or anticipation of an official proceeding. (Emphasis added).

Congress in enacting 1515 (c) provided generalized substantive protection for all lawyers as a safe harbor provision as to all practice-related crimes, including conspiracy to obstruct justice or tamper with a witness. Title 18 U.S.C. § 1515 (c) would instruct the jury that an agreement in the case at bar would in this area, bona fide legal services have no illegal purpose barring a Title 18 U.S.C. § 371 conviction. Title 18 U.S.C. § 1515 (c) provides that the tampering crime and the obstruction crime, which are both statutes within the instant chapter, cannot be "punished" because Mr. Roth provided lawful, bona fide, legal representation services in connection with or anticipation of an official proceeding and at any

stage of legal proceedings.2 This section is not limited or as narrow in its scope as merely whether the agreement charged in the conspiracy was illegal. The court's only instruction to the trial jury about propriety diluted the law and presented that pale version of the defendant's significant legal protection to the jury as the entirety of the law. The Second Circuit compounded the error and put itself directly in conflict with the Eleventh Circuit in United States v. Kloess, 251 F.3d 941 (11th Cir. 2002), where after reversing an outright dismissal of the indictment, in anticipation of a trial on the issue, the Circuit opined on instructions and expert witness testimony as protections for the lawyer accused as part of 1515 (c) protection.

The Second Circuit as to the charge held in the case at bar that merely telling the jury that they had to find that the object of the agreement was illegal was sufficient. The generic instruction does not serve to direct the jury to the specific issue in this prosecution i.e. the prosecution claim that the defendant "crossed the line of legality in his role of defending the criminally accused. The statute is a specific "safe harbor" provision. The Circuit conflict allows the Second Circuit version of a pale version of the Congressionally enacted protection from the broad sweep of the obstruction Chapter of Title 18 to stand in the face of the Eleventh Circuit's due regard for the role of the

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2 Title 18 U.S.C. 1515 (c) is not confined to a particular statute but to the Chapter itself in contrast to the affirmative defense in 1512 does. Title 18 U.S.C. 1515 (c) is not labeled by Congress as an affirmative defense as referenced in 18 U.S.C. § 1512 (e).

criminal defense attorney in the constitutional scheme.

The deficiency in the instruction approved by the Second Circuit is demonstrated by the fact that there is nothing wrong with defense counsel doing everything possible to learn of the witnesses against a client including if they were working for the government side in the criminal case. Given the limits of discovery, and the rule of law that no one owns a witness, defense investigation requires testing of what is said by the government, the client and the potential witnesses, without regard to whom the lawyer believes or does not believe. Likewise there is nothing wrong with disbelieving an individual who claims that the client is guilty. The defense is not obligated to stop investigating merely because the client claims that he is guilty. See A.B.A. Standards for the Defense of Criminal Cases 4-4.1. There is nothing wrong with an aggressive investigation even after the client admits to the crime to the lawyer in confidence. The seeking of affidavits contrary to the true statements of government informants allows counsel to create opportunities of impeachment just as a prosecutor puts a witness into the Grand Jury to "freeze" testimony. The expert could have testified on the similarity between government tactics and defense tactics including the use of the affidavit as the government used grand jury testimony to "freeze" the witnesses' story.

Unguided juries without appropriate instructions as allowed by the Second Circuit permit prosecutors to regulate by use of the

criminal law, what is permitted behavior and what is a jailable offense by their adversaries.

This Court has never had occasion to decide whether it is a full or an affirmative defense. Two Circuits decided it was an affirmative defense. Petitioner contends it is a complete defense.[3] The Second Circuit in effect held that it not even be instructed as any defense. Affirmative defenses are complete defenses that, once proven by a defendant by a preponderance of the evidence, negate criminal liability for an offense notwithstanding that the prosecution has otherwise proven all the elements of the offense beyond a reasonable doubt. Assuming arguendo that it is an affirmative defense, the petitioner met his burden as to a 18 U.S.C. § 1515 (c) defense.

The Court's charge on the entirety of the issue was far too limited because bona fide legal services of a criminal defense lawyer involve more than merely interviewing prosecution witnesses. The instruction failed to state the applicable law and deprived the petitioner of his right to a properly instructed jury on the applicable law. It fails to provide the same protection as would an affirmative defense. The instructions misled the jury as to the applicable legal standard. Without an

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[3] Title 18 U.S.C. § 1515 (c) lays down a prohibition of punishment which is in the nature of a complete defense. If it was to be only an affirmative defense, Congress certainly had the power to say so. Congress elected to not so limit this section of law and set it to cover the entire chapter. The defense of 18 U.S.C. § 1515 (c) does negate facts of the charged crimes so as to make it a full defense. Peterson v. New York, 432 U.S. 197, 206-7 (1972).

instruction as to a defense, affirmative or otherwise the jury could not give full effect to the law.

Neither side asked the Court for an instruction under 18 U.S.C. § 1515 (c). The government only sought a charge as to an affirmative defense limited to witness tampering, citing only 18 U.S.C. § 1512 (e). Petitioner refused the charge because it only went to one of the two objects of the conspiracy. Had either side known of 1515 (c), then there would have been an instruction covering both objects of the conspiracy. The defense properly rejected this charge. Such a charge would highlight the absence of a defense to the other aspect. The proper charge under § 1515 (c) would have solved the problem and been an accurate and complete statement of the law. Neither side appeared to realize that § 1515 (c) existed and that it would have encompassed the entirety of the conspiratorial purposes alleged.4

Lawful bona fide legal representation does not require that the lawyer accept, as conclusive, the client's admissions. It is an affirmative part of legal representation that an investigation be conducted and that counsel not accept the other sides version of events or that its witnesses are telling the truth. As part of the defense, the team

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4 The government's position indicated that they did not know of the law either. At the charge conference, the government insisted that the defense "take on the burden of the affirmative defense" under § 1512 (b) in order to get a favorable charge. Any suggestion that the prosecution knew of the law and stood mute would be an accusation that petitioner would be loathe to make.

can and should seek to learn of and develop material that is harmful to the credibility of government witnesses, including seeking to produce statements which recant or are exculpatory, in contrast to earlier inculpatory statements to law enforcement. Where, as part of a law enforcement prepared script, Flip Melvin claimed that he was on the run, or would be willing to sign anything true or not, or seeks money for testimony, or gives contrary statements to maintain his street rep, all of that may be developed by the defense and exploited. Where a witness tells a story, it is the defense's constitutional responsibility to do more than merely interview the witness and challenge and prod recollection, including suggest other possibilities which the witness may reject or accept in demonstration of the witness' willingness to lie for his own benefit. For the defense all these things are demanded in the nature of zealous advocacy in an adversary system.

Justice White, dissenting in part and concurring in part in United States v. Wade, 388 U.S. 218, 256-258 (1967):

> Defense counsel has no comparable obligation to ascertain or present the truth. Our system assigns him a different mission. He must be and is interested in preventing the conviction of the innocent, but, absent a voluntary plea of guilty, we also insist that he defend his client whether he is innocent or guilty. If he can confuse a witness, even a truthful one,

> or make him appear at a disadvantage, unsure or indecisive, that will be his normal course. Our interest in not convicting the innocent permits counsel to put the State to its proof, to put the State's case in the worst possible light, regardless of what he thinks or knows to be the truth. Undoubtedly there are some limits which defense counsel must observe but more often than not, defense counsel will cross-examine a prosecution witness, and impeach him if he can, even if he thinks the witness is telling the truth, just as he will attempt to destroy a witness who he thinks is lying. In this respect, as part of our modified adversary system and as part of the duty imposed on the most honorable defense counsel, we countenance or require conduct which in many instances has little, if any, relation to the search for truth.

In direct contrast to the Second Circuit, other Circuits have considered the range of protection accorded by 18 U.S.C. § 1515 (c). Further Petitioner has an even greater claim to the instruction than others accorded the protection. Unlike the lawyer convicted in United States v. Cueto, 151 F.3d 620 (7th Cir. 1998), Roth had no personal financial interest in Cherry or Bryant's drug or gun business of the clients. See Cueto, 151 F.3d 629, 631-4. Similarly in United States v. Cintolo, 818 F.2d 980 (1st Cir. 1987) Roth did not act against the interests of the client conniving with the crime boss to force the client into

contempt. Roth in each of the earlier state case and the federal cases followed the client's desire for a full investigation, had the witnesses interviewed and their recollections tested. In the state case it produced some contrary versions as well as unshakable testimony. In the federal case, it produced an early extortion attempt by Flip even before he was instructed to do so by law enforcement. It produces a willingness to sign anything. Melvin also made direct misrepresentations to his government handlers about the meeting harmful to the Petitioner that were not borne out once St. John produced his copy of the recorded meeting after Melvin's mysteriously malfunctioned.

The conflict between the Circuits on this significant safe harbor provision is demonstrated by comparing the unpublished opinion in this matter with the decision in Kloess and United States v. Mintmire, 507 F.3d 1273 (11th Cir. 2007). In United States v. Kloess, 251 F.3d 941 (11th Cir. 2002), the Court held that the statute requires that, once the accused lawyer has shown himself to be a licensed lawyer, retained by a client to perform the legal representation that constituted the charged conduct, the government then bears both the burden of proof and the burden of persuasion beyond a reasonable doubt to rebut the affirmative showing in demonstrating the non bona fide lawful purpose. The Eleventh Circuit held that the jury must be so instructed as to the allocation of burdens of proof.

Petitioner met the minimal burden to obtain the charge on the law.5 The Eleventh Circuit concluded that the defendant-lawyer's burdens of pleading and proof were met by the text of the indictment alleging that the accused was a licensed lawyer, and second, that he had been retained to provide the representation which consisted of the charged offense. Kloess, 251 F.3d at 948 n.8.

The Eleventh Circuit specifically permits an inference of innocent purpose. The Second Circuit requires that the object of the conspiracy be legal. In the case at bar, the trial jury was never instructed on the ability to infer an innocent purpose. Roth faced an implied illicit purpose for everything he did, which was not accurate as a matter of law.

In United States v. Mintmire, 507 F.3d 1273 (11th Cir. 2007) the Eleventh Circuit expressly approved an instruction similar to the one that should have been given in the case at bar. The instruction in contrast to those approved by the Second Circuit were as follows:

> The law provides a complete defense commonly referred to as an affirmative defense to the offenses charged in . . . the indictment because one who is performing bona fide legal

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5 Through the indictment and the testimony of Cherry and Bryant that they retained him to defend them, Roth met the minimal burden entitling him to the charge under § 1515 (c) and he would not have been forced to testify. Mr. Roth was a licensed attorney who was validly retained to perform the legal representation, which constitutes the charged conduct

representation services does not have an improper purpose. His purpose to zealously represent his client is fully protected by the law. If you find that the defendant provided legal representation services, in connection with the charged conduct ... and the defendant was providing lawful, bona fide legal representation services in connection with or in anticipation of an official proceeding, that is, a grand jury or SEC investigation, then you must find the defendant not guilty. ... If you find the defendant provided legal representation services, in connection with the charged conduct ..., the government must also prove beyond a reasonable doubt that the defendant was not providing lawful, bona fide legal representation services in connection with or anticipation of an official proceeding. Mintmire, at 1277.

The government was allowed to claim a bright line that cannot be stepped over including a claim that the providing of a fully unsigned affidavit to a witness for consideration or signature if he agrees is witness tampering and obstruction of justice. But, giving a witness a draft affidavit that included matters not previously discussed with the witness is not obstruction of justice in other Circuits. See United States v. Brand, 775 F.2d 1460 (11th Cir. 1985). See also Koller v. Richardson-Merrill, Inc., 737 F.2d 1038 (DC Cir. 1984) vacated on other grounds 472 U.S. 424 (1985).

The court should have given a strong and expanded instruction on the issues of what may be done by a criminal defense lawyer or his investigator, consistent with § 1515 (c). Instructions would have removed concerns that lay jurors in criminal cases, unacquainted with the counter-intuitive but accepted roles of lawyers, will mistake good faith traditional lawyering for criminal conduct.

The failure to request a charge under Title 18 U.S.C. § 1515 (c) constitutes plain error. United States v. Vonn, 535 U.S. 35, 58 (2002). The standard under the plain error gives the Court the discretionary power to correct a forfeited trial error if the error was obvious or "plain"; affected the defendant's substantial rights and "seriously affected the fairness, integrity or public reputation of judicial proceedings." United States v. Cotton, 535 U.S. 625, 631-32 (2002); United States v. Olano, 507 U.S. 725, 731-32, 736 (1993). The failure of the litigants or the court to recognize the specific "safe harbor provisions" as to prosecution of criminal defense attorneys under the obstruction of justice title specifically raises all of the Olano elements.

In Wiborg v. United States, 163 U.S. 632 (1896), the Court reversed for an unpreserved error in the charge, stating: "[I]f a plain error was committed in a matter so absolutely vital to defendants, we feel ourselves at liberty to correct it." Id. at 658. The failure to acknowledge a statute is an error that is plain. As a statutory defense it adversely affected the Petitioner's rights. If the

appellate court leaves the error uncorrected, some lawful right of a party will have been denied, and there is a risk that the outcome would have been different had the right been protected. On the other hand, if the appellate court corrects the error, the only available remedy is a remand for a new trial.

A reviewing court uses the power to order one "sparingly," Jones v. United States, 527 U.S. 373, 389 (1999), and requires one only "in those circumstances in which a miscarriage of justice would otherwise result," Olano, 507 U.S. at 736 (internal quotation marks omitted).

In making the estimate necessary to apply the plain error doctrine, the reviewing court must ask whether the outcome of the first trial would have been different without the error. The absence of error would have yielded a different result. Had the jury been able to determine guilt or innocence and not pass judgment upon what a criminal defense attorney may or may not properly do, a different result would have obtained. Failure to charge a specific defense, even if it is held to be an affirmative defense is plain error where such a statute was enacted specifically to be presented to juries in a prosecution such as this one. Further allowing a jury to decide whether criminal defense activity is criminal conduct relying on their ability to determine the legality of the conduct without aid of the law, is error. Where such error is so egregious and obvious as to make the trial judge and prosecutor derelict in permitting it, despite the defendant's failure to object and the failure of all parties and the court to find a section of law

enacted years ago and clearly found in statute cannot be exclusively laid at the defendant's door without undermining public confidence in the rule of law and confidence in the judicial system required to apply all of the law which directly leads to the final Olano factor that of fairness, integrity or public reputation or judicial proceedings is often the rubric that defeats a defendant. In United States v. Cintolo, 818 F.2d at 905 the Court wrote: "We recognize the dangers that are present if prosecutors can be allowed to inquire into motive in such confined circumstances, and we respect the importance of allowing defense counsel to perform legitimate activities without let or hindrance. We do not see this case, however, edging into that forbidden terrain." This case squats in the middle of that forbidden terrain correctable only be plain error relief.

POINT II

A CONFLICT IN THE CIRCUITS EXISTS REGARDING EXPERT WITNESSES TESTIMONY ADMISSIBILITY WHEN THE SECOND CIRCUIT APPROVED THE TRIAL COURT'S FAILURE TO PERMIT EXPERT TESTIMONY IN THE AREA OF WHAT A CRIMINAL DEFENSE LAWYER IS ETHICALLY REQUIRED TO DO IN DEFENSE OF A CLIENT.

There are grave dangers to the Sixth Amendment values when prosecutions are predicated upon allegations that the acts of a defense lawyer are criminal. The defense sought to proffer an expert in the area of criminal defense and the means and methods of defending a case against the federal government. The court below

barred the testimony as "pontificating" and indicated that it will instruct the jury as to the means and methods of properly defending a case against the government. Instead the court reneged on its promise and provided the tepid instruction.[6] An expert would have testified if allowed as to the lawful means that can be used to defend his client and the range and variety of endeavors. The expert would have testified as to what constitutes ethically required conduct in the criminal investigation of a case, in contrast to the beliefs of lay persons.

The defense ended up with a severely limited opportunity to present to the jury little more than the fact that a lawyer may contact a prosecution witnesses to interview them in a criminal matter. This failed to encompass the proper scope of the role of a criminal defense attorney seeking to investigate and prepare to defend a federal criminal case. The court precluded expert testimony of the means and methods of criminal defense, the issues attendant the ethics of a defense lawyer who is bound not to stop investigating even if his client has indicated his guilt. Further the jury would have learned that it is the right and responsibility of counsel to test every aspect of the government's case. Once the court indicated that the matter could be handled by an instruction, the defense was deprived of vital evidence. The Second Circuit approval of the

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6 "I further instruct you that there is nothing improper about a defense attorney or private investigator interviewing witnesses for the prosecution in a matter where they have been retained".

practice places it in direct conflict with the Eleventh Circuit on this important aspect of criminal defense lawyers as prosecution targets and the legitimacy of such prosecutions.

Both the Eleventh Circuit and the Ninth Circuit have held that expert testimony proffered by the defense should be admitted in prosecutions of attorneys for conspiracy and substantive offenses of obstruction of justice and witness tampering. A conviction of a lawyer-defendant was reversed where the court disallowed expert testimony on the ethical rules pertaining to the duty of loyalty and zealous representation and the duty of confidentiality. This evidence was deemed by the Ninth Circuit to have been relevant to establishing the lawyer's intent and state of mind. United States v. Kellington, 217 F.3d 1084 (9th Cir. 2000) held that the prosecution of a lawyer who would have as a defense the safe harbor provision requires admission of expert testimony. Evidence of Kellington's ethical obligations was admissible and relevant to the question of his intent. Kellington as a defendant also had a fundamental right, under the Sixth Amendment, to present his theory of the case. Where there is such a limitation, which in turn truncated the defense, it left Kellington "unable to frame and give content to the core of his defense, that Kellington was attempting (however imprudently in hindsight) to provide his client with bona fide legal representation." Kellington held that in seeking to avail himself of § 1515 (c), the defendant was entitled to introduce the testimony of legal ethics experts, to have the jury fully consider their

testimony as bearing on his state of mind, and to have his lawyers argue that testimony to the jury.

Similarly the conviction of an attorney-defendant was overturned because the trial court precluded the defense from introducing evidence of the lawyer's duty of preserving the attorney-client privilege and the duty to counsel the client against committing further crime. Such evidence was deemed necessary in order to show that the lawyer-defendant acted not with criminal intent but within the legitimate bounds of legal representation. United State v. Kelly, 888 F.2d 732 (11th Cir. 1989).

As seen already in Kloess, the Eleventh Circuit relied on Kelly and Killington to blue print the need for instructions as well as expert testimony. It wrote the defendant is entitled to rebut the government's proof. Kelly, 888 F.2d at 744; Kellington, 217 F.3d at 1098; United States v. Cavin, 39 F.3d 1299, 1309 (5th Cir. 1994) ("[A] lawyer accused of participating in his client's fraud is entitled to present evidence of his professional, including ethical, responsibilities, and the manner in which they influenced him. Exclusion of such evidence prevents the lawyer from effectively presenting his defense"). Citing Kelly it stated "it would be incongruous to admit such evidence when tendered in support of guilt, but not when offered for exculpatory purposes." Kelly, 888 F.2d at 744.

These cases in two Circuits have held that lawyers in the position of the petitioner being tried based upon their professional actions are entitled

to have expert witnesses explain the role of the criminal defense lawyer to the jury so as to prevent the jury from conjuring their own rules of what the Sixth Amendment and the ethics rules require.7

The ethical issues presented by the prosecution and answerable by the expert witness was whether or not a criminal defense lawyer engaging in conduct ordinarily part of the representation of a defendant acts with corrupt motive when fulfilling his constitutional duty to help an obviously and admittedly guilty client avoid jail. Such testimony would have been helpful to the jury since it is totally outside the area of their knowledge (as opposed to their beliefs occasioned by television trials).

If the jurors are to pass on the issue of the lawyer's conduct taken in defense of a client then they may believe as so many citizens do that the efforts of the lawyer to obtain an acquittal and otherwise keep the guilty person out of jail constitutes conspiring with a corrupt motive. To the average person, justice means that the guilty go to jail and any effort to derail the train could be viewed as conspiring to obstruct justice. The risk is

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7 Kloess suggests that other Circuits also are in conflict with the Second Circuit's interpretation indicating that the issue is "well settled" that in the prosecution of a lawyer for conduct stemming from his or her representation of a client, expert testimony is relevant to establish the lawyer's intent and state of mind; citing United States v. Machi, 811 F.2d 991, 999-1000 (7th Cir. 1987); United States v. Klauber, 611 F.2d 512, 520 (4th Cir. 1979); United States v. Rabbitt, 583 F.2d 1014, 1028-29 (8th Cir. 1978).

very real that jurors, those who ask at cocktail parties and the like "How can you defend those people?" are the same persons that will be asked to determine the subjective intent to obstruct justice by acting deliberately to keep "those people" out of jail.

The subtlety of the constitutional role of the criminal defense lawyer is a counter intuitive role to layman sitting on a jury. The public perception drives the decision to a determination of criminal conduct might be subject to a determination of criminal conduct where such conduct might be subject to a professional's assessment as appeared to the public perception. Due to the fundamentally counter intuitive role criminal defense lawyers play in this society, an expert serves to draw the line between good faith lawyering conduct and criminal conduct. The jury's ability to understand and assess will either be extremely limited or perhaps distorted by individual jurors' prior life experiences. Thus the Court should have allowed testimony - properly limited - that will allow the jury to hear discussion (and perhaps expert disagreement) about the proper role and activities of lawyers. It is well settled in every Circuit but the Second Circuit that in the prosecution of a lawyer for conduct stemming from his or her representation of a client, expert testimony on the lawyer's ethical obligations is relevant to establish the lawyer's intent and state of mind.

The testimony of the defense lawyer's expert would have directly contradicted the prosecutor's version of what the obligations and "lines" exist relative to lawyer's conduct during the course of

the defense of a case. Instead it would provide a challenge to the crux of the government's case, as to what were and what were not legitimate areas of behavior and advocacy for even the most zealous of attorneys, grounded in the statutory safe harbor provision under 18 U.S.C. § 1515.

This was the defense and the salient issue for the jury in Roth's case, in the government's words: "the line to be drawn". Under § 1515 (c) and Kellington and Kloess, a lawyer charged with conspiracy to obstruct or tamper, must be able to introduce testimony that the particular services are ethically permitted or required. From such testimony, the jury would then be asked to infer, at the very least, that the lawyer had a good faith basis to believe that his conduct was lawful. See Kellington, supra.

CONCLUSION

When professional conduct of a criminal defense lawyer is tested by a jury on the basis of the prosecution theory characterizing it as "over the line", but is in fact only approaches the line, a jury is left to decide the issue, without proper instructions on the totality of the applicable law and without any expert witness' help, would be more likely view the conduct as unethical and equate that belief with the supposition that the acts of the defense lawyer are therefore criminal. Based upon the foregoing the Writ of Certiorari should issue on each of all respects.

DATED: New York, New York
May 25, 2008

Respectfully submitted,

/s/ DAVID L. LEWIS
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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT HTTP://WWW.CA2.USCOURTS.GOV/). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York on the 22nd day of February, two thousand and eight.

Present:
HON. RALPH K. WINTER,
HON. CHESTER J. STRAUB,
HON. SONIA SOTOMAYOR,
Circuit Judges.

Nos. 05-2430-cr (L); 05-243 8-cr(CON)

United States of America,
Appellee,

v.

David St. John and Donald Roth,
Defendants-Appellants.

For Defendant-Appellant St. John:

WILLIAM I. ARONWALD,
Aronwald & Pykett,
White Plains, New York.

For Defendant-Appellant Roth:

DAVID L. LEWIS,
Lewis & Fiore,
New York, New York.

For Appellee:

JOHN T. ZACH, Assistant United States Attorney (Cathy Seibel, Deputy United States Attorney; Katherine Polk Failla, Assistant United States

Attorney, *of counsel, on the brief), for* Michael J. Garcia, United States Attorney for the Southern District of New York, New York, New York.

UPON DUE CONSIDERATION, it is hereby ORDERED, ADJUDGED AND DECREED that the judgment of the United States District Court for the Southern District of New York is AFFIRMED.

Defendants-appellants David St. John ("St. John") and Donald Roth ("Roth") (collectively, the "defendants") appeal from their May 16, 2005 judgments of conviction after a jury trial in the United States District Court for the Southern District of New York (Robinson, J.) for conspiracy to commit witness tampering and obstruction of justice, in violation of 18 U.S.C. § 371. Roth was sentenced principally to a term of 60 months' imprisonment and St. John to a term of 48 months' imprisonment, both to be followed by three years' supervised release. We assume the parties' familiarity with the facts and procedural history of this case.

[1] Challenged Evidentiary Rulings

First, defendants claim that they were denied a fair trial as a result of the district court's decision to admit evidence of the Antonio ("Tone") Bryant murder case pursuant to Federal Rule of Evidence 404(b). Both defendants contend that the Rule 404(b) evidence overshadowed the conduct charged in the Indictment; Roth asserts that the evidence constituted improper propensity evidence and thus constituted an error of law, while St. John maintains that the evidence was "strikingly dissimila[r]" to the conduct

charged. Reviewing the district court's ruling for abuse of discretion, *see United States v. Taubman*, 297 F.3d 161, 164 (2d Cir. 2002) (per curiam), we find no error in its determination that the proffered evidence was properly admitted "other act" evidence, *see United States v. Pascarella*, 84 F.3d 61, 69 (2d Cir. 1996). Under our "inclusionary" approach to "other crimes, wrongs, or acts" evidence, *see United States v. Harris*, 733 F.2d 994, 1006 (2d Cir. 1984), evidence of the Tone Bryant murder case was relevant to the defendants' knowledge and intent, *see United States v. Colon*, 880 F.2d 650, 657 (2d Cir. 1989), and the existence of a common plan or scheme, *see United States v. Sliker*, 751 F.2d 477, 486-87 (2d Cir. 1984). In addition, defendants' claims of prejudice are unavailing, as the district court did not abuse its discretion in setting the limits on the amount of evidence admitted under Rule 404(b), and any risk of unfair prejudice was minimized with a "thorough and carefully worded limiting instruction." *United States v. Paulino*, 445 F.3d 211, 223 (2d Cir. 2006).

Second, defendants claim that the district court improperly excluded expert testimony at trial. Although we acknowledge the restrictiveness of the district court's eventual ruling, we conclude that it did not abuse its discretion because the jury was instructed that it is lawful for a defense lawyer or a representative to contact a prosecution witness, and defendants chose this limiting instruction over proffering expert witness testimony within the parameters set by the district court. *See Zuchowitz v. United States*, 140 F.3d 381, 386 (2d Cir. 1998) (reviewing district court's decision to admit or exclude expert testimony under a "highly deferential abuse of

discretion standard"); *United States v. Stewart,* 433 F.3d 273, 311 (2d Cir. 2006) (upholding district court's decision to exclude expert testimony on the legality of defendant's trade, as this would have potentially usurped "the role of the trial judge in instructing the jury as to the applicable law or the role of the jury in applying that law to the facts before it").

Third, defendants assert that they were prejudiced by the district court's ruling excluding the testimony of Orange County Court Judge Stewart Rosenwasser, the presiding judge in the Tone Bryant murder case, and quashing their subpoena for such testimony. Because Assistant District Attorney David Byrne, who was in charge of the Tone Bryant case, testified about the reasons for the plea offers he made, Judge Rosenwasser's testimony concerning the same subject matter was unnecessary and speculative. We therefore find no error in the district court's ruling. *See In re Subpoena Issued to Dennis Friedman,* 350 F.3d 65, 68 (2d Cir. 2003) (reviewing district court's ruling on motion to quash subpoena for abuse of discretion); *United States v. Ianniello,* 866 F.2d 540, 544 (2d Cir. 1989) (noting that "asking a district judge to testify is a serious matter"). Further, to the extent that defendants sought testimony regarding Judge Rosenwasser's mental processes, exclusion of that testimony was not in error. *See Rubens v. Mason,* 387 F.3d 183, 191 (2d Cir. 2004) (holding that admission of an arbitrator's affidavit in a subsequent malpractice action was in error, in part, because it violated the rule proscribing admission of "testimony revealing the deliberative thought processes of judges, juries, or arbitrators").

Finally, defendants contend that a fingerprint analysis performed on Government Exhibit 1 8—which was an affidavit in Yolanda Delgado's possession—constituted *Brady* material that should have been turned over prior to trial. *See Brady v. Maryland,* 373 U.S. 83, 87 (1963). St. John also claims that the district court improperly excluded testimony concerning the analysis pursuant to Fed. R. Evid. 16. As the district court concluded, however, the fingerprint analysis is not *Brady* material because it would not have "affected the outcome of the case," nor would it have "put the whole case in such a different light as to undermine confidence in the verdict," *United States v. Coppa,* 267 F.3d 132, 135 (2d Cir. 2001) (internal quotation marks omitted). Further, because there was substantial evidence tying Government Exhibit 18 to the defendants, the district court did not abuse its discretion in precluding testimony on the conclusions, or lack thereof, that could be drawn from the fingerprint analysis. *See United States v. Anglin,* 169 F.3d 154, 162 (2d Cir. 1999).

[2] Witnesses' Assertions of Privilege

Defendants argue that the district court erred in upholding the attorney-client privilege as to confidential communications between informant witnesses Timothy Cherry ("Cherry") and Raymond Bryant ("Bryant") and the counsel who had been appointed to represent them after Roth withdrew. This contention is unavailing for the reasons described by the district court: the fact that Cherry allegedly lied under oath and his attorney later informed the court that his client was maintaining his

position does not involve the attorney-client privilege. *See In re Grand Jury Subpoena Duces Tecum*, 731 F.2d 1032, 1038 (2d Cir. 1984) (collecting cases).

We also reject defendants' argument that it was improper for Cherry and Raymond to assert the attorney-client privilege outside the presence of the jury on the basis that they were entitled to an adverse inference because of the witnesses' invocation of the privilege. There is nothing in our case law to suggest that such an assertion of privilege must be made in the presence of the jury. Indeed, in the civil context, we have held that there is no basis for the jury to draw an adverse inference because of the assertion of the attorney-client privilege. *See Nabisco, Inc. v. PF Brands, Inc.*, 191 F.3d 208, 226 (2d Cir. 1999) ("[W]e know of no precedent supporting such an [entitlement to an adverse] inference based on the invocation of the attorney-client privilege."), *abrogated on other grounds, Mosley v. V Secret Catalogue, Inc.*, 537 U.S. 418 (2003). Therefore the error, if any, was harmless.

Defendants' claim that they were entitled to notes taken by attorneys at proffer sessions for cooperating witnesses is equally unavailing. Defendants only speculate that these notes reflect inconsistent statements made by the cooperating witnesses. Thus, the district court did not abuse its discretion in finding the notes to be protected work product. *See United States v. Nobles*, 422 U.S. 225, 237-38 (1975) (observing that the work product doctrine is vital to "assuring the proper functioning of the criminal justice system").

[3] Failure to Instruct Jury on 18 U.S.C.§ 1515(c)

Defendants further claim that the district court erred in not instructing the jury on 18 U. S.C. § 1515(c). Because defendants did not raise the issue at the time the instructions were given, the standard of review is plain error. Fed. R. Crim. P. 52(b). Defendants contend that they meet this standard because § 1515(c) provides them with a complete defense to the offenses charged. We do not find it necessary, however, to decide whether § 1515(c) is a complete or an affirmative defense because the substance of this provision was, in fact, given by the court when the jury was instructed that it necessarily had to find that the defendants knowingly conspired to pursue an unlawful purpose. This instruction, by definition, excludes the possibility of bona fide legal advice constituting criminal behavior. *See United States v. Doyle,* 130 F.3d 523, 540 (2d Cir. 1997) (affirming conviction where "the essence of [defendant's] request [was] effectively presented elsewhere in the charge"). Accordingly, the district court did not err in charging the jury as requested by the parties.

[4] Jury Charge under *United States v. Arthur Andersen*

Defendants contend that the intervening decision of the Supreme Court in *Arthur Andersen LLP v. United States,* 544 U.S. 696 (2005), renders the jury charge invalid. Viewing the charge as a whole, *see United States v. Alina-Marshall,* 336 F.3d 167, 170 (2d Cir. 2003), we conclude that the district court conveyed

the substantial equivalent of *Arthur Andersen*'s holding that the defendant must be "conscious of wrongdoing," *Arthur Andersen*, 544 U.S. at 706, by instructing the jury to convict only if it found that each defendant acted with an "improper purpose" and "had the purpose of corrupt persuasion," the latter phrase defined as "includ[ing] an attempt to induce a witness to become unavailable to testify or to testify falsely." Thus, we find no error here. *See United States v. Kaplan*, 490 F.3d 110, 126 (2d Cir. 2007).[1]

[5] Jury Charge under *United States v. Gaines*

Defendants similarly assert that the district court's instructions concerning witness credibility and defendants' testimony were improper in light of this Court's intervening decision in *United States v. Gaines*, 457 F.3d 238 (2d Cir. 2006). Viewing the charge as whole, *see United States v. Brutus*, 505 F.3d 80, 85 (2d Cir. 2007), it is questionable whether it is erroneous under current law. Although *Gaines*

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[1] The government urges us to clarify whether, in light of the Supreme Court's decision in *Johnson v. United States*, 520 U.S. 461, 467-70 (1997), our "modified plain error" approach survives. *See United States v. Viola*, 35 F.3d 37, 41-44 (2d Cir. 1994) (applying "modified plain error" review—which shifts the burden of persuasion from defendant to the government when showing prejudice under the plain error standard—when the source of the alleged error was a supervening judicial decision that altered "a settled rule of law in the circuit"). We need not address the merits of this argument because we find that there was no error, plain or otherwise, in the instructions.

expressly disapproved of jury instructions that included "deep personal interest language," 457 F.3d at 249, we did not decide whether this instruction, on its own, sufficiently diluted the presumption of innocence to constitute reversible error. Nevertheless, defendants argue that, taken in combination with the court's general instruction that any interested witness has "a motive to testify falsely," the charge was erroneous. Assuming the two portions of the charge should be read and analyzed together, there is no "'reasonable possibility that the [error] complained of might have contributed to the conviction.'" *Chapman v. California,* 386 U.S. 18, 24 (1967) (alternation in original) (quoting *Fahy v. Connecticut,* 375 U.S. 85, 86-87 (1963)). The cooperating witnesses presented voluminous testimony regarding the operation of the scheme. Cherry testified about a meeting with defendants at the New Orleans Steakhouse, at which Roth explained how he "[got] witnesses to flip their story." The witnesses' testimony, moreover, was corroborated by documentary evidence at trial, including copies of the false exculpatory affidavits that were recovered from St. John, Roth and Yolanda Delgado. This evidence makes plain that the error, if any, was harmless. *See Brutus,* 505 F.3d at 88-90.

[6] Seating of Alternate Juror

St. John maintains that the district court improperly seated a juror who he claims had an admitted bias against defense counsel. The juror's complaint about defense counsel speaking during the government's summation, however, gives no indication on its face of any purportedly partiality. The district court, moreover, questioned the juror

directly about his ability to deliberate impartially. Thus, the district court did not abuse its discretion when it decided to seat this alternate juror. *See United States v. Torres*, 128 F.3d 38, 43-44 (2d Cir. 1997) (trial judge

enjoys broad discretion in determining whether or not to excuse a juror for cause, and its decision is entitled to deference on appeal).

[7] Denial of a Fair Trial

Roth submits that "by rulings, by rebukes and by a combination of both," the district court deprived him of a fair trial. Roth, however, does not point to specific portions of the record or particular rulings, but rather reargues that certain evidence admitted at trial pursuant to Rule 404(b) was overly prejudicial. This argument is meritless. We have made clear that in "determining whether a trial judge's conduct deprived a defendant of a fair trial, we must examine the entire record to determine if jurors have been impressed with the trial judge's partiality to one side to the point that this became a factor in the[ir] determination." *United States v. Matt*, 116 F.3d 971, 974 (2d Cir. 1997) (per curiam) (alteration in original) (internal quotation marks omitted). The record reflects no such partiality and we reject this argument.

Roth additionally contends that the district court in silencing him on one occasion deprived him of a fair trial. As the government points out, the statement at issue was made during a recess, occurred outside of the presence of the jury, and was made in response to counsel's interruption after repeated prior

admonishments to wait until the district court had finished speaking. Roth's challenge is therefore unavailing.

[8] Roth's Challenge to his Sentence

Roth contends that the district court's sentence was procedurally and substantively unreasonable. We find no merit in Roth's claim, which we review for reasonableness. *See United States v. Fernandez*, 443 F.3d 19, 26 (2d Cir. 2006). The district court's sentence of 60 months' imprisonment, while it was the statutory maximum, was less than half of the low-end of the applicable Guidelines range. Moreover, the district court considered all of the § 3 553(a) factors in determining the appropriate sentence and did not rely solely on the Guidelines, which it treated as advisory. Giving due respect to the district court's reasoned judgment, *see Gall v. United States*, 128 S. Ct. 586, 594-96 (2007), we see neither legal error nor an unreasonable sentence.

We have considered defendants' remaining arguments and find them to be without merit. For the reasons discussed, the judgment of the district court is AFFIRMED.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

By: _____

UNITED STATES CONSTITUTION, AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CONSTITUTION, AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

18 U.S.C. § 1515(c)

This chapter does not prohibit or punish the providing of lawful, bona fide, legal representation services in connection with or anticipation of an official proceeding.